

**BEFORE THE
CALIFORNIA BOARD OF OCCUPATIONAL THERAPY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

DAVID ALAN THURBER
Occupational Therapist No. OT 5072,

Respondent.

Case No. OT 2004 117

OAH No. 2007090344

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the California Board of Occupational Therapy as its Decision in the above-entitled matter, except that pursuant to Government Code Section 11517(c)(2)(C) the Decision is hereby modified for technical reasons as follows:

1. Consistent with Paragraph 27 of the FACTUAL FINDINGS, Paragraph 17 of the LEGAL CONCLUSIONS, page 14 of the Proposed Decision, shall read as follows:

“17. Cause exists under Business and Professions Code section 125.3 to issue an order directing Thurber to pay \$57,210 for the board’s reasonable costs of investigation and enforcement.”

2. Consistent with Paragraph 27 of the FACTUAL FINDINGS, the second paragraph of the ORDER, page 14 of the Proposed Decision, shall read as follows:

“David Alan Thurber is directed to pay \$57,210 to the California Board of Occupational Therapy for its costs of the investigation and enforcement.”

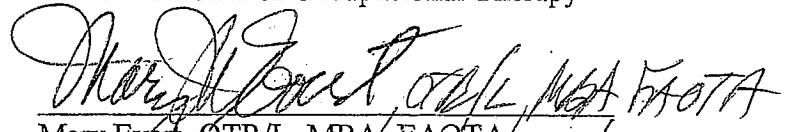
3. The Administrative Law Judge's signed and dated Proposed Decision shall be considered to have been signed and issued on July 25, 2008.

This Decision shall become effective November 8, 2008.

IT IS SO ORDERED.

Date: October 9, 2008

California Board of Occupational Therapy


Mary Eyer, OTR/L, MBA, FAOTA

BEFORE THE
CALIFORNIA BOARD OF OCCUPATIONAL THERAPY
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DAVID ALAN THURBER,

Occupational Therapist License No. OT 5072,

Respondent.

Case No. OT 2004 117

OAH No. 2007090344

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter July 9, 2008, in San Diego, California.

Carl W. Sonne, Deputy Attorney General, Office of the Attorney General, State of California, represented complainant Heather Martin, Executive Director, California Board of Occupational Therapy, Department of Consumer Affairs, State of California.

No appearance was made by or on behalf of respondent David Alan Thurber, who was properly served with required jurisdictional documents. Respondent delivered various documents and a letter dated July 9, 2008 to the Office of Administrative Hearings before the hearing commenced. The letter is referenced in Factual Finding 24 hereafter.

The matter was submitted on July 9, 2008.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 22, 2007, complainant Heather Martin, Executive Director of the California Board of Occupational Therapy (the board), Department of Consumer Affairs, State of California, signed the accusation in Case No. OT 2004 117.

Respondent David Alan Thurber (Thurber or respondent) was served with the accusation and other required jurisdictional documents, and timely filed a notice of defense

dated July 17, 2007. Thurber requested that all further correspondence and notices be sent to him at 3422 10th Avenue, San Diego, CA 92103.

On March 28, 2008, complainant signed the first amended accusation in Case No. OT 2004 117. The first amended accusation essentially alleged that CareerStaff Unlimited employed Thurber in his licensed capacity as an occupational therapist; that Thurber was responsible for providing occupational therapy services to special needs students at Rolando Park Elementary School; that in 2005, Thurber falsely certified that he had conducted a number of therapy sessions with special needs students, and billed for those services he did not in fact render; that CareerStaff Unlimited billed the San Diego City School District for the services that Thurber did not provide; that CareerStaff Unlimited paid Thurber for services that he did not render; and that Thurber's activities involved unprofessional conduct— incompetence and/or gross negligence (first cause for discipline), unprofessional conduct—repeated negligent acts (second cause for discipline), fraud substantially related to his professional duties (third cause for discipline), and falsification of patient records (fourth cause for discipline). The first amended accusation also alleged that Thurber downloaded pornography onto a school district issued laptop (fifth cause for discipline), which also provided cause to impose discipline against Thurber's occupational therapy license.

Thurber was served with the first amended accusation and other required jurisdictional documents. The new allegations and charges set forth in the first amended accusation were deemed controverted under Government Code section 11507.

On June 13, 2008, Thurber was served with a notice of hearing at the address set forth in the notice of defense. The notice of hearing advised that the administrative hearing in this matter was set for Wednesday, July 9, 2008, at the state office building located 1350 Front Street, Suite 6022, San Diego, CA 92101, to commence at 9:00 a.m. Thurber signed a domestic return receipt acknowledging receipt of the notice of hearing.

On July 9, 2008, after waiting for an appearance to be made by Thurber or on his behalf, the administrative record was opened at 9:30 a.m. A witness present in the courtroom mentioned that she had just seen Thurber in the hallway outside the courtroom. The security guard outside the courtroom stated that moments before he had observed a male deliver a file to the Office of Administrative Hearings reception desk and then leave the area. Kirk Hempel (Investigator Hempel), an investigator with the Department of Consumer Affairs, undertook an investigation to determine Thurber's whereabouts. Investigator Hempel determined that Thurber had signed into the state office building at 9:15 a.m. and had signed out of the state office building at 9:30 a.m. The file left at the reception desk included documents the Office of the Attorney General previously provided to Thurber, together with a letter dated July 9, 2008, signed by David A. Thurber, which is set forth in Factual Finding 24.

Complainant's request to proceed with the disciplinary hearing on a default basis was granted. Jurisdictional documents were presented. Complainant waived the presentation of an opening statement. Complainant's motion to seal the disciplinary record to protect the privacy of students whose names were contained in various exhibits was granted. Sworn

testimony was adduced and documentary evidence was received. Complainant waived the presentation of a closing argument, the record was closed, and the matter was submitted.

License Status

2. On December 23, 2002, the board issued Occupational Therapy License No. OT-5072 to David Alan Thurber. The license was set to expire on October 31, 2009.

On April 4, 2008, OT-5072 was suspended, and the suspension remains in effect until a final decision is rendered in this disciplinary proceeding. There is no history of any other administrative discipline having been imposed against OT-5072.

The Occupational Therapy Practice Act

3. The Occupational Therapy Practice Act (the Act) is found at Business and Professions Code section 2570 et seq.

Under Business and Professions Code section 2570.2, subdivision (k), the "practice of occupational therapy" means the therapeutic use of purposeful and meaningful goal-directed activities which engage an individual's body and mind in meaningful, organized, and self-directed actions that maximize independence, prevent or minimize disability, and maintain health. Occupational therapy services encompass assessment, treatment, education, and consultations with individuals referred for occupational therapy (OT) services following a diagnosis of disease or disorder or for students who receive OT as part of an Individualized Education Plan (IEP) under the federal Individuals with Disabilities Education Act (IDEA). Occupational therapy assessment identifies performance abilities and limitations that are necessary for self-maintenance, learning, work, and other similar meaningful activities. Occupational therapy treatment is focused on developing, improving, or restoring functional daily living skills; compensating for and preventing dysfunction, or minimizing disability. Occupational therapy techniques involve teaching activities of daily living (excluding speech-language skills), designing or fabricating selective temporary orthotic devices; and applying or training in the use of assistive technology or orthotic and prosthetic devices. Occupational therapy consultations provide expert advice to enhance the function and quality of life. Consultation or treatment may involve modification of tasks or environments to allow an individual to achieve maximum independence. OT services are provided individually, in groups, or through social groups.

The California Legislature found and declared that the practice of occupational therapy in California affects the public health, safety, and welfare and it was necessary for the practice of occupational therapy to be subject to regulation and control. (Bus. & Prof. Code, § 2570.1.)

Under Business and Professions Code section 2570.2, subdivision (b), an "occupational therapist" is an individual who meets minimum educational requirements and who holds a license in good standing. Business and Professions Code section 2570.3

prohibits any person from practicing occupational therapy or holding himself or herself out to be an occupational therapist unless licensed.

An occupational therapist must document his or her evaluation, goals, treatment plan, and treatment in patient records which must be maintained for a period of no less than seven years following the discharge of the patient, except that the records of unemancipated minors must be maintained at least one year after the minor has reached the age of 18 years, and not in any case less than seven years. (Bus. & Prof. Code, § 2570.185.)

The board administers, coordinates, and enforces the provisions of the Act, evaluating the qualifications of applicants and approving examinations for licensure. The board enacts regulations related to professional conduct to carry out the purpose of the Act, including, but not limited to, rules related to professional licensure or certification and ethical standards of practice. (Bus. & Prof. Code, § 2570.20.) Protection of the public is the board's highest priority in exercising its licensing, regulatory, and disciplinary functions; whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public is paramount. (Bus. & Prof. Code, § 2570.25.)

Thurber's Licensed Activities

4. CareerStaff Unlimited (CSU), an enterprise based in Irving, Texas, is a subsidiary of Sun Healthcare Group (SUN). CSU contracted with the San Diego Unified School District (the district) to provide the district with the services of licensed occupational therapists to meet the needs of the district and its students. In August 2003, Thurber accepted a position with CSU as a per diem occupational therapist, under an agreement in which he would be paid \$38 per hour per hour for school system assignments. CSU, in turn, would bill the district \$58 per hour for Thurber's services. As a CSU employee, Thurber was required to comply with SUN's code of conduct and to maintain high standards of honesty, integrity, and professional excellence on a daily basis. CSU employees were required to submit truthful time records and the employment of any employee who submitted false or fraudulent time records was subject to termination.

5. Thurber began working in the district on October 8, 2004. He initially was assigned to work at seven elementary school sites. In December 2004, after Thurber complained that he was not effective in serving at that many sites, Thurber was assigned to provide services only at Rolando Park Elementary School. Patricia LaBouff (LaBouff), a physical therapist employed by the district, was Thurber's supervisor.

6. The district expected Thurber to be present on campus from 7:30 a.m. to 4:00 p.m., or from 8:00 a.m. to 4:30 p.m. daily, spending at least 50 percent of his time working directly with students, and spending the remainder of his time preparing student intervention notes and IEPs, and training and assisting others. Thurber was not authorized to work from home. Thurber was not authorized to work on a part-time basis.

7. On April 4, 2005, Thurber informed LaBouff that his grandfather had passed away and that he would not be at work for a week. This representation was untrue. The

same day, Beverly Hull (Hull), a special education teacher at Rolando Park Elementary School, advised LaBouff that Thurber was frequently absent from the school site and when he was there, he arrived late and left early. On April 5, 2005, Hull advised LaBouff that Thurber was not at school the week before the spring break (March 14-18, 2005) and that he was not on campus on a regular basis thereafter. On April 5, 2005, Sarah Ott (Ott), a special education teacher, advised LaBouff that Thurber was frequently absent from the classroom, that he often came late to the classroom, and that he needed to be reminded to complete IEPs.

LaBouff reviewed Thurber's time sheets and observed that Thurber billed the district for professional services continuously at the rate of 40 hours per week from January 2005 through April 8, 2005. LaBouff commenced an investigation which included an effort to locate Thurber's working files (there were no documents at his work space, other than one day's written work samples), a review of attendance records, a review of services attendance logs, meeting with a school site administrator, meeting with special education teachers, meeting with CSU representatives, and reviewing sign-in sheets for IEP meetings that Thurber was required to attend.

8. Ott, a special education teacher, testified that although Thurber was assigned to provide OT services in her classroom for two and a half hours per week, Thurber was seldom present in the classroom after January 2005 and he was always late to IEP meetings. Thurber was not present at all in the classroom in March 2005. Thurber sent Ott (and others) a letter dated March 4, 2005, in which he apologized for his odd behavior and advised that he was recently in Idaho dealing with his partner's mental health and substance abuse issues. Ott notified LaBouff of this letter and she expressed her concerns about the lack of services Thurber provided, which resulted in Ott's inability to meet mandated student IEP goals.

9. Garth Hebbler (Hebbler), a special education teacher, testified that Thurber was assigned to provide OT services in Hebbler's classroom twice a week during the 2004-2005 school year. Thurber's frequent absences from Hebbler's classroom increased after the winter break and they continued through the spring semester. When Thurber came to the classroom, he did not bring the students' IEP goals with him and he rarely showed up with student IEPs. Thurber provided Hebbler with the same letter he sent to Ott.

10. Hull, an adaptive physical education teacher at Rolando Park Elementary School, shared a workspace with Thurber. Hull never saw Thurber arrive at the school site before 10:00 a.m. Hull became so concerned about the situation she notified LaBouff of Thurber's tardiness and increasingly frequent absences.

11. Following her investigation, LaBouff concluded that Thurber likely billed for professional services he did not render.

12. The district notified CSU of its concerns. The district terminated Thurber's services on April 8, 2005. On April 11, 2005, following numerous counseling sessions and the completion of an internal investigation, CSU suspended Thurber. On April 14, 2005, after determining that Thurber had submitted false records to support billings for professional services he did not render, CSU terminated Thurber's employment.

13. CSU delivered a binder of materials to LaBouff, which she began to review on April 11, 2005. LaBouff met with Thurber on April 21, 2006, when he returned to the campus to retrieve personal belongings. Thurber looked at all of the documents in LaBouff's possession and Thurber confirmed he did not possess any materials for OT services that he provided to students other than those materials in LaBouff's possession.

14. After reviewing all of the documentation, LaBouff determined that Thurber was assigned to provide OT services to 44 students attending Rolando Park Elementary School and to three head-start students off campus. Thurber's services, for the most part, were to be provided to each student on a weekly basis. Thurber was required to evaluate and assess each student and to provide treatment and consultation.

Thurber billed for services rendered for each of these 44 students. However, no intervention plan was found for any student. Most students did not have a therapy report on file as required, and to the extent that therapy reports were on file, they were almost always completed by Thurber's aide. More specifically:

- Student AA was to receive 30 minutes of OT services per week for the entire school year. AA last received OT services on January 6, 2005.
- Student CC was to receive 30 minutes of OT services per week for an entire school year. CC last received OT services on January 6, 2005.
- Student KC was to receive 30 minutes of OT services per week for an entire school year. KC's file did not contain a therapy services agreement or intervention notes.
- Student AP was to receive 15 hours of OT services per year. AP received no OT services after January 26, 2005, and OT services were not been completed.
- Student NP was to receive 30 minutes of OT services per week, but there was nothing in NP's file to show NP received any OT services. There were consultation notes documenting telephone calls between Thurber and NP's mother in October and November 2004.
- For students A, OR, JR, JS and LW, there were therapy reports containing those student's names, IEP dates, and frequency requirements, but their files contained no other information.
- There were no records at all for the other 34 students assigned to Thurber. One student, SM, was absent from school on March 17, 2005, when Thurber submitted a bill for OT services he claimed to have provided to SM that day.

In the billing reports that Thurber submitted, Thurber represented that he provided direct OT services to 13 students when, in fact, he was in Idaho.

15. LaBouff was alarmed for several reasons. First, and most importantly, special needs students had been deprived of their right to receive required OT assessments and treatment, potentially denying them a free and appropriate education and jeopardizing the district's right to federal funding under IDEA. Second, CSU billed the district for services that were not provided.

16. On the issue of the occupational therapy services that were not provided to students, LaBouff determined that it was in the best interests of the district and its students to provide each student at the earliest opportunity with all OT services to which the student was entitled. In this regard, no credit was given for professional services Thurber claimed he had provided.

17. On the issue of the district's claim of reimbursement from CSU, LaBouff met with Bob Dehaemers, a CSU representative, to discuss the matter further.

CSU provided an accounting which showed that Thurber claimed he had worked 62 days from September 27 through December 17, 2004, with CSU billing Thurber's time at the rate of \$58 per hour [455 hours x \$58 per hour = \$26,390], and that Thurber claimed he had worked 50 days from January 3 through April 8, 2005, with CSU billing Thurber's time at the rate of \$58 per hour [390 hours x \$58 per hour = \$22,620]. The district claimed Thurber worked far less than he billed, but the district permitted CSU to retain a full day's billing for each day it could actually be confirmed that Thurber was on the Rolando Park Elementary School campus, even if only for a moment.

18. In his letter dated March 4, 2006, to various staff members working at Rolando Park Elementary School, Thurber wrote in part:

"Well, first of all thank you for tolerating the odd behavior, ins-and-outs lateness and missing time. I feel I need to sort of give you all an explanation, as you deserve that.

Was having the challenge of dealing with my partner's 'mental health' issues, as well as substance abuse. A couple of weeks ago we decided to admit into Mesa Vista Hospital - which lasted for two days . . . So last weekend for his safety and, of course my feelings for him, I last second flew to Idaho with him to see family . . . It got to a point that we needed to admit him up there.

I wanted to make sure and be there for the first day or so as I promised . . . Unfortunately, I had planned on coming back earlier, but was unable to get a flight late Wednesday evening and the best I could do on Thursday was a ticket well over \$600.00. So I got pretty much stuck waiting until this morning . . .

. . . I am very sorry for letting some things get in the way of my work and job. I promise to take care of everything and get on track again - starting this weekend . . ."

19. The laptop computer the district issued to Thurber was retrieved. A district employee claimed he found inappropriate material on the laptop computer including on-line dating service advertisements, advertisements for escort services, and photographs of nude males. While the evidence offered to support these matters was unopposed, this evidence consisted of double hearsay and nothing corroborated it. The charges that Thurber downloaded pornography onto his district-issued laptop were not supported by clear and convincing evidence.

20. CSU filed a complaint with the board.

On February 6, 2006, complainant assigned Investigator Hempel to investigate this matter. Investigator Hempel met with Thurber on May 23, 2006. During that meeting, Investigator Hempel reviewed the therapy services attendance logs for early March 2005. Thurber's entries for the period from March 1 through March 3, 2005, set forth 29 OT sessions. Thurber said he worked eight-hour days in Idaho on those 29 matters. Thurber then confirmed he authored a note regarding student TD for March 1, 2005, which indicated a 30-minute session from 10:30 a.m. in which Thurber wrote, "TD beginning curve circular trace back again. Needs a lot of support throughout." Investigator Hempel reviewed similar direct intervention notes for students who allegedly received services when Thurber was, in fact, in Idaho, and the substance of those notes would lead any reasonable person to believe that Thurber rendered services personally on the dates indicated. Thurber told Investigator Hempel that the date on an intervention note was not always the same date he provided the service, that there was nothing wrong with billing for the indirect time he spent working on student files when he was in Idaho. In fact, Thurber created patient records in an effort to conceal his absence and to justify billing for services he had not provided.

21. Lisa A. Test (Test), a licensed occupational therapist in good standing, provided expert testimony and other evidence. Test holds a bachelors degree in Ergonomics from the University of California, Santa Barbara, a masters degree in Occupational Therapy from the University of Southern California, and is currently in a doctoral program at USC to obtain a Ph.D. in Occupational Therapy.

Test served as a staff occupational therapist at the UCLA/Neuropsychiatric Institute from 1987 to 1991, as the occupational therapy liaison at the UCLA/Neuropsychiatric Institute from 1990 to 1991, as a staff occupational therapist for the Los Angeles Unified School District from 1991 to 1998, and as the coordinating occupational therapist for the Los Angeles Unified School District from 1998 to the present. Test is a member of several professional organizations and has served on USC's clinical faculty since 1995.

Test reviewed the investigative report, the consumer complaint, comment sheets, student records, CSU agreements and billing guidelines, records of counseling, timecards, invoices, attendance logs, caseload roster forms, sign-in sheets, and other documents. In addition, Test reviewed the AOTA Code of Ethics, California law pertaining to the practice of occupational therapy, the California Education Code, and the IDEA.

22. Based on her education, training, and experience, and based upon her review of the materials described, Test concluded that Thurber engaged in unprofessional conduct by negligently failing to meet standards of practice; more specifically, Thurber failed to provide students with occupational therapy evaluations and services required by IEPs, he failed to provide occupational therapy services for which he billed; he submitted fraudulent billings for occupational therapy services; he prepared erroneous chart notes; and he failed to maintain accurate records. Test concluded further that Thurber's misconduct demonstrated professional incompetence.

23. Other educators who testified in this matter were familiar with services provided by licensed occupational therapists. These educators testified they had never seen any licensed occupational therapist engage in conduct similar to that of Thurber with regard to his repeated tardiness or complete absence from the worksite, his failure to provide assessments and treatment, and his failure to document professional activities.

Evidence in Explanation, Mitigation, and Rehabilitation

24. In his letter dated July 9, 2008, Thurber wrote;

"I David A. Thurber being unable to financially support a fair hearing in the matter of CA OT License 5072 give up my rights, obligations or any factors of OT practice in the state of CA at this time on this date, July 9, 2008. By no means does this reflect any agreement with the partial evidence established over the past 3 years however by the accused.

Thank you for the support along the way for this hearing. I will be sad in not being able to be a part of OT at this time, and sad to see that everyone is a loser in this situation. You can take my "L", but no one can and will ever take my OTR from me, and on a personal side I will not waste any person's time in this matter even attempting to extend this matter further. I am embarrassed at what I have read and the people who contributed and for the person reading this fiction of a respected therapist for the past 15 years who is well respect in this community, and take this for truth.

Thank you for giving me all the incredible memories, experiences and joy.

David A Thurber"

25. Nothing else was offered in defense or in explanation of the charges. Nothing else was offered to establish mitigating circumstances or rehabilitation. Thurber requested a hearing and Thurber was afforded the opportunity to present evidence in his defense and on his behalf. He elected not to appear.

The Appropriate Measure of Discipline

26. This administrative proceeding is noncriminal and nonpenal in nature; the function of this proceeding is not to punish a licensee, but to protect the public, which is the highest priority for the board and for administrative law judges who hear these disciplinary matters. The only measure of discipline which will protect the public in this matter is the outright revocation of Thurber's license.

Costs of Investigation and Enforcement

27. Complainant's declaration of costs established that the board's recoverable investigative costs totaled \$8,230. These costs included approximately 45 hours of investigation, billed at the rate of \$140 to \$180 per hour, and nine hours of expert witness services, billed at the rate of \$40 per hour. Nothing established the investigative costs were unreasonable and these costs were not unreasonable on their face. The declaration of the deputy attorney general who prosecuted the matter stated that he and colleagues billed the board for 221 hours of legal services at the rate of \$158 per hour. The hearing was factually complicated. Counsel was well prepared. Reasonable enforcement costs total \$48,980.

Reasonable costs of investigation and enforcement total \$57,210.

LEGAL CONCLUSIONS

Purpose of License Discipline

1. The purpose of the Occupational Therapy Practice Act is to assure the high quality of occupational therapy practice, i.e., to keep unqualified and undesirable persons and those guilty of unprofessional conduct out of the profession.

2. The purpose of administrative discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

The Standard of Proof

3. The standard of proof in an administrative action seeking to suspend or revoke a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

4. Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

The Imposition of License Discipline

5. Business and Professions Code section 2570.26 provides in part:

“(a) The board may, after a hearing . . . suspend, revoke, or place on probation a license . . .

(b) As used in this chapter, ‘license’ includes a license, certificate, limited permit, or any other authorization to engage in practice regulated by this chapter.

(c) The proceedings under this section shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the board shall have all the powers granted therein.”

6. Business and Professions Code section 2570.27, subdivision (a) provides:

“(a) The board may discipline a licensee by any or a combination of the following methods:

(1) Placing the license on probation with terms and conditions.

(2) Suspending the license and the right to practice occupational therapy for a period not to exceed one year.

(3) Revoking the license.

(4) Suspending or staying the disciplinary order, or portions of it, with or without conditions.

(5) Taking other action as the board, in its discretion, deems proper.”

Grounds for License Discipline

7. Business and Professions Code section 2570.28 provides as follows:

“The board may . . . discipline a licensee for any of the following:

(a) Unprofessional conduct, including, but not limited to, the following:

(1) Incompetence or gross negligence in carrying out usual occupational therapy functions.

(2) Repeated similar negligent acts in carrying out usual occupational therapy functions . . .

(h) Committing any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, or duties of a licensee.

(k) Falsifying or making grossly incorrect, grossly inconsistent, or unintelligible entries in a patient or hospital record or any other record. . . .”

8. California Code of Regulations, title 16, section 4170 provides in part:

“A violation of any ethical standard of practice constitutes grounds for disciplinary action. Every person who holds a license, certificate or limited permit issued by the board shall comply with the following ethical standards of practice:

(f) Occupational therapy practitioners shall provide accurate information about occupational therapy services.

(3) Occupational therapy practitioners shall refrain from using or participating in the use of any form of communication that contains false, fraudulent, deceptive statements or claims”

The Standard of Care, Gross Negligence, Repeated Negligent Acts, Incompetence, Substantial Relationship

9. The “standard of care” requires a professional to possess and exercise that level of knowledge and skill ordinarily possessed by members in good standing in similar circumstances. (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408.)

10. The standard of care must be established by expert testimony. It is often a function of custom and practice. The process necessarily requires some evidence of an ascertainable practice. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305; *N.N.V. v. American Association of Blood Banks* (1999) 75 Cal.App.4th 1358-1384-1385.)

11. Gross negligence involves very great negligence or the want of even scant care. So far as the phrase has any accepted legal meaning, “gross negligence” is an extreme departure from the ordinary standard of care. (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 196; *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971.)

12. The phrase "repeated negligent acts" as used in disciplinary statutes defining unprofessional conduct means two or more negligent acts. (*Zabetian v. Medical Board* (2000) 80 Cal. App. 4th 462, 468.)

13. The term "incompetency" is a relative one generally used in a variety of factual contexts to indicate an absence of qualification, ability or fitness to perform a prescribed duty or function. It is commonly defined to mean a general lack of present ability to perform a given duty as distinguished from inability to perform such duty as a result of mere neglect or omission. Such an interpretation is totally consistent with the declared legislative objective of public protection by requiring a minimum standard of professional conduct on the part of those licensed to engage in regulated activities. The terms negligence and incompetency are not synonymous; a licensee may be competent or capable of performing a given duty but negligent in performing that duty. (*Pollak v. Kinder* (1978) 85 Cal.App.3d 833, 837-838.)

14. A substantial relationship or nexus must exist between proscribed conduct and an individual's current fitness to practice a particular profession. It is not necessary for the conduct forming the basis for discipline to occur in the actual practice of the profession. An individual's dishonesty, poor character, lack of integrity, and inability or unwillingness to follow the law demonstrates professional unfitness meriting license discipline. There is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are deeply and daily involved in various aspects of a professional practice. Actual patient harm need not be shown since such a requirement overlooks the preventative functions of license discipline, whose main purpose is to protect the public and to prevent future harm. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 771-771.)

Cause Exists to Revoke Thurber's License

15. The clear and convincing evidence established cause under Business and Professions Code section 2570.28, subdivision (a) to revoke Thurber's license based on Thurber's unprofessional conduct which included incompetence, gross negligence, and repeated negligent acts. The clear and convincing evidence established cause under Business and Professions Code section 2570.28, subdivision (h) to revoke Thurber's license based on his fraudulent, dishonest, and corrupt acts that are substantially related to the qualifications, functions, or duties of a licensee. The clear and convincing evidence established cause under Business and Professions Code section 2570.28, subdivision (k) to revoke Thurber's license based on Thurber's falsifying and making grossly improper entries in patient records and related billing records. The violations resulted in harm to Thurber's employer, the district, and special needs students. As reflected in his letter dated July 9, 2008, Thurber shows no remorse for his conduct and in fact does not even accept that he did anything wrong. When all the matters established by the clear and convincing evidence are considered, the outright revocation of Thurber's license is the only measure of discipline that will protect the public.

This conclusion is based on Factual Findings 2-18 and 20-26 and on Legal Conclusions 1-14.

Costs of Investigation and Enforcement

16. Business and Professions Code section 125.3 provides in part:

"(a) . . . in any order issued in resolution of a disciplinary proceeding before any board within the department . . . the board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case.

(d) The administrative law judge shall make a proposed finding of the amount of the reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a)"

17. Cause exists under Business and Professions Code section 125.3 to issue an order directing Thurber to pay \$48,980 for the board's reasonable costs of investigation and enforcement.

This conclusion is based on all Factual Finding 27 and on all Legal Conclusions 15 and 16.

ORDER

Occupational Therapy License No. OT 5072 issued to David Alan Thurber is revoked.

David Alan Thurber is directed to pay \$48,980 to the California Board of Occupational Therapy for its costs of investigation and enforcement.

DATED: 7/25/02


JAMES AHLER

Administrative Law Judge

Office of Administrative Hearings